

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

NOTICE TO THE BAR

PROPOSED AMENDMENTS TO  
THE LOCAL CIVIL RULES

Notice is hereby given to the Bar and all interested parties that the United States District Court for the District of New Jersey proposes to adopt Local Civil Rule 5.3 and Local Civil Rule 26.1(e).

Civ. RULE 5.3 PROTECTIVE ORDERS AND PUBLIC ACCESS UNDER CM/ECF

(a) Scope of Rule

- (1) This rule shall govern any request by a party to seal, or otherwise restrict public access to, any materials filed with the Court or utilized in connection with judicial decision-making. This rule shall also govern any request by a party or parties to seal, or otherwise restrict public access to, any judicial proceedings.
- (2) As used in this rule, “materials” include pleadings as well as documents of any nature and in any medium. “Judicial proceedings” include hearings and trials but do not include conferences in chambers.
- (3) This rule shall not apply to any materials or judicial proceedings which must be sealed pursuant to statute or other law.
- (4) Subject to this rule and to statute or other law, all materials and judicial proceedings are matters of public record and shall not be sealed.

(b) Discovery Materials

- (1) Notwithstanding this rule, parties may enter into written agreements to keep materials produced in discovery confidential and to return or destroy such materials as agreed by parties and as allowed by law.
- (2) Parties may submit to a Judge or Magistrate Judge an agreed-on form of order which embodies a written agreement as described above. Any such form of order must be accompanied by an affidavit or attorney certification filed electronically under the designation “affidavit/certification in support of discovery confidentiality order.” The affidavit or attorney certification shall describe (a) the nature of the materials to be kept confidential, (b) the legitimate private or public interests which warrant confidentiality and (c) the clearly defined and serious injury that would result should the order not be

entered. The affidavit or attorney certification shall be available for public review.

- (3) No form of order submitted by parties shall supersede the provisions of this rule with regard to the filing of materials or judicial proceedings. The form of order may, however, provide for the return or destruction of discovery materials as agreed by parties. The form of order shall be subject to modification by a judge or magistrate judge at any time.
- (4) Any order under this section shall be filed electronically under the designation “discovery confidentiality order.”
- (5) Any dispute regarding the entry of, or the confidentiality of discovery materials under, any order under this section shall be brought before a Magistrate Judge pursuant to L. Civ. R. 37(a)(1).

(c) Motion to Seal or Otherwise Restrict Public Access

- (1) Any request by a party or parties to seal, or otherwise restrict public access to, any materials or judicial proceedings shall be made by formal motion pursuant to L. Civ. R. 7.1(c) and (d). Any such motion shall be filed electronically under the designation “motion to seal materials” or “motion to seal judicial proceedings,” and shall be returnable on the next available return date.
- (2) Any motion to seal or otherwise restrict public access shall be available for review by the public. The motion papers shall describe (a) the nature of the materials or proceedings at issue, (b) the legitimate private or public interests which warrant the relief sought, (c) the clearly defined and serious injury that would result if the relief sought is not granted, and (d) why a less restrictive alternative to the relief sought is not available.
- (3) Any materials deemed confidential by a party or parties and submitted with regard to a motion to seal or otherwise restrict public access shall be filed under the designation “confidential materials” and shall remain sealed until such time as the motion is decided.
- (4) Any interested person may move to intervene pursuant to Fed. R. Civ. P. 24 (b) before the return date of any motion to seal or otherwise restrict public access.
- (5) Any order or opinion on any motion to seal or otherwise restrict public access shall include findings on the factors set forth in (c)(2) above as well as other findings required by law and shall be filed electronically under the designation “order or opinion to seal.” Such orders and opinions may be redacted. Unredacted orders and opinions may be filed under seal, either electronically or in other medium.
- (6) Notwithstanding the above, on emergent application of a party or parties or sua sponte, a Judge or Magistrate Judge may seal or otherwise restrict public access to materials or judicial proceedings on a temporary basis. The Judge or Magistrate Judge shall do so by order which sets forth the basis for the temporary relief and which shall be filed

electronically under the designation “temporary order to seal.” Any interested person may move pursuant to L. Civ. R. 7.1 and Fed. R. Civ. P. 24 (b) to intervene, which motion shall be made returnable on the next available return date.

(d) Settlement Agreements

- (1) No party or parties shall submit a proposed settlement agreement for approval by a Judge or Magistrate Judge unless required to do so by statute or other law or for the purpose of retaining jurisdiction.
- (2) Any settlement agreement filed with the Court or incorporated into an order shall, absent a showing of “good cause” under Fed. R. Civ. P. 26(c), be deemed a public record and available for public review.

(e) Dockets

No docket shall be sealed. However, entries on a docket may be sealed pursuant to the provisions of this rule.

(f) Web Site

The Clerk shall maintain for public review on the official Court PACER Site a consolidated report which reflects all motions, orders, and opinions described in this rule.

#### EXPLANATORY NOTE PROPOSED LOCAL CIVIL RULE 5.3

History. In June of 2004, the Board of Judges was presented with a Lawyers Advisory Committee recommendation for the adoption of a local civil rule that would provide for public (i.e., press) notice of requests to seal, among other things, documents and proceedings. Several months before, in February of 2004, the District of New Jersey implemented CM/ECF (Case Management/Electronic Case Filing). This allowed the electronic filing of pleadings, motions, briefs, etc., under descriptive “events.” CM/ECF also allowed remote access to dockets and filed materials as well as the creation of compilations or reports on the events.

Recognizing that CM/ECF might have a significant impact on what the Lawyers Advisory Committee recommended, the Board of Judges deferred the recommendation. Thereafter, the proposed local civil rule in its current form (“the Rule”) was drafted. It was reviewed on an informal basis by representatives of the Administrative Office of the United States Courts and the Federal Judicial Center. It was also reviewed by Professor Laurie Kratky Dore of Drake University Law School in Des Moines, Iowa. Professor Dore is the author of a leading article on confidentiality, “Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement,” 74 Notre Dame L. Rev. 283 (1999), and of “Settlement, Secrecy, and Judicial Discretion: South Carolina’s

New Rules Governing the Sealing of Settlements,” 55 S.C. L. Rev. 791 (2004). The Rule was circulated among members of the Committee on Rules on Practice and Procedure of the Board of Judges and thereafter submitted to the Lawyers Advisory Committee.

Subparagraph (a)(1). This subparagraph describes the scope of the Rule. It applies to any application to seal materials filed with the Court, materials utilized in connection with judicial decision-making, or judicial proceedings. The use of the phrase, “otherwise restrict public access,” as used in the Rule, is intended to address any application which might seek less than the complete sealing of materials or proceedings. The phrase, “in connection with judicial decision-making,” is intended to exclude, among other things, letters to judges which are not substantive in nature. See, for the definition of a “judicial record”, In re Cendant Corp., 260 F.3d 183 (3d Cir. 2001), and for the distinction between discovery and nondiscovery pretrial motions, Leucadia, Inc. v. Applied Extrusion Technologies, Inc., 998 F2d 157 (3d Cir.1993).

Subparagraph (a)(2). This subparagraph defines “materials” and “judicial proceedings.” The definitions are intended to be broad and to allow for the development of case law. For that reason, the word “materials” is used rather than “judicial records,” the latter approaching a term of art. Note that judicial proceedings are not intended to encompass in-chambers conferences.

Subparagraph (a)(3). The purpose of this subparagraph is to make clear that the rule is not intended to affect any “statute or other law” that mandates sealing of materials or judicial proceedings (for example, amended Section 205 (c)(3) of the E-Government Act of 2002, Pub. L. No. 107-347, and the qui tam provisions of the False Claims Act, 31 U.S.C. § 3729 et seq.).

Subparagraph (a)(4). The right of public access to filed materials and judicial proceedings derives from the First Amendment and federal common law. Consistent with this right, this subparagraph establishes a presumption in favor of public access.

Subparagraph (b). In keeping with the comprehensive nature of the Rule, this subparagraph is intended to apply to unfiled discovery materials and to be consistent with footnote 17 of Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994): “because of the benefits of umbrella protective orders in cases involving large-scale discovery, the court may construct a broad protective order upon a threshold showing by the movant of good cause. \*\*\*. After delivery of the documents, the opposing party would have the opportunity to indicate precisely which documents it believed not to be confidential, and the party seeking to maintain the seal would have the burden to proof with respect to those documents.” 23 F.3d at 787 n.17 (citation omitted). As a general proposition, there is no right of public access to unfiled discovery materials. See, e.g., Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984); Estate of Frankl v. Goodyear Tire and Rubber and Co., 181 N.J. 1 (2004) (per curium).

Subparagraph (b)(1) recognizes the above proposition, allows parties to enter into agreements such as that contemplated by Pansy, and also allows materials to be returned or destroyed. See, with regard to “Agreements on Return or Destruction of Tangible Evidence,” ABA

Section on Litigation Ethical Guidelines for Settlement Negotiations, Guideline 4.2.4 (August 2002).

Subparagraph (b)(2). This subparagraph describes the procedure which parties must follow in submitting blanket protective orders. Consistent with Pansy, there must be a showing by affidavit or certification of “good cause” and specific information must be provided. The affidavit or certification must also be available for public review. The intent of subparagraph (b)(2) is to allow parties to describe the materials in issue in categorical fashion and thus to avoid document-by-document description. This subparagraph does not go in greater detail as to the contents of the affidavit or certification. The sufficiency of an affidavit or certification is a matter for individual determination by a Judge or Magistrate Judge.

Subparagraph (b)(3). This subparagraph is intended to make plain the distinction between blanket protective orders and orders for the sealing of materials filed with the Court. Blanket protective orders should not include a provision that allows materials to be filed under seal with the Court.

Subparagraph (b)(4). This subparagraph, together with subparagraph (b)(2), describes “events” for purposes of CM/ECF. Affidavits or certifications in support of blanket protective orders as well as the protective orders should be electronically filed using these events.

Subparagraph (b)(5). This subparagraph contemplates that disputes may arise with regard to the terms of blanket protective orders and the designation of materials under such orders. Should such disputes arise, the parties are directed to the procedure set forth in Local Civil Rule 37(a)(1) for the resolution of discovery disputes.

Subparagraph (c). This subparagraph establishes the procedure by which applications must be made to seal or otherwise restrict public access to filed materials or judicial proceedings.

Subparagraph (c)(1). This subparagraph provides that any such application must be made by formal motion.

Subparagraph (c)(2). This subparagraph provides that any motion must be available for public access and must set forth, at a minimum, certain specified information.

Subparagraph (c)(3). Under Third Circuit precedent, the filing of otherwise confidential material may make that material a public record and subject to public access. See, e.g., Bank of America Nat’l Trust and Savings Ass’n v. Hotel Rittenhouse Assoc., 800 F.2d 339 (3d Cir. 1988). This subparagraph is intended to allow confidential materials to be filed and remain under seal until a motion to seal or otherwise restrict public access is ruled on. Otherwise, arguably confidential materials would be “transmuted” into materials presumptively subject to public access. See Gambale v. Deutsche Bank AG, 377 F.3d 133, 143 n.8 (2d Cir. 2004).

Subparagraph (c)(4). “[T]he procedural device of permissive intervention is appropriately used to enable a litigant who was not an original party to an action to challenge protective or confidentiality orders entered in that action.” Pansy, 23 F.3d at 778. Consistent with Pansy, this

subparagraph allows a person to move to intervene pursuant to Rule 24 of Federal Rules of Civil Procedure before a motion to seal or to otherwise restrict public access is returnable.

Subparagraph (c)(5). This subparagraph serves two functions. First, it identifies the “event” corresponding to a sealing order or opinion, as subparagraph (c)(1) identifies events for sealing motions. Subparagraph (c)(5) also reminds Judges and Magistrate Judges that, as appropriate, opinions and orders on motions to seal or otherwise restrict public access may be filed in redacted and unredacted form.

Subparagraph (c)(6). This subparagraph is patterned after Section 7(a) of the Vermont Rules for Public Access to Court Records. It is intended to address emergent applications by parties where there may be a legitimate need for a temporary sealing order (for example, when an ex parte seizure order is sought in a trademark infringement action). The subparagraph identifies the appropriate CM/ECF event and also provides for motions to intervene.

Subparagraph (d). As a general proposition, settlement agreements are not presented to Judges or Magistrate Judges for “approval.” Such approval has no legal significance. See, e.g., Pascarella v. Bruck, 190 N.J. Super. 118 (App. Div. 1983). Moreover, judicial approval of a settlement may make that settlement a public record and subject to public access. See Jessup v. Luther, 277 F.3d 926 (7<sup>th</sup> Cir. 2002). For these reasons, subparagraph (d) (1) proves that settlement agreements will not be approved by Judges or Magistrate Judges unless such approval is required by law (for example, in class actions or actions involving infants). Subdivision (d)(1) does, however, provide for judicial approval of a settlement if the intent of the parties in seeking that approval is to have the Court retain jurisdiction to enforce a settlement agreement. See, e.g., Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994). Subdivision (d)(2) provides that, once filed with the Court or incorporated in an order, a settlement agreement becomes a public record and subject to public access absent a good cause showing under Rule 26(c) of the Federal Rules of Civil Procedure.

Subparagraph (e). Dockets are sources of basic information about civil actions and are historically public records. See, e.g., United States v. Criden, 675 F.2d 550 (3d Cir.1982). Thus, this subparagraph provides that dockets will not be sealed but that, consistent with the Rule, specific docket entries may be. See Webster Groves School Dist. v. Pulitzer Publishing Co., 898 F.2d 1371 (8<sup>th</sup> Cir. 1990).

Subparagraph (f). This subdivision requires the Clerk to maintain a report which reflects all motions, order and opinions described in the Rule. The intent of this subparagraph is that reports be generated based on the “events” referred to in the Rule and be available to the general public through PACER.

## Civ. RULE 26.1 DISCOVERY

### (e) Protective Orders

Procedures for discovery-related protective orders are set forth in L.Civ.R. 5.3

Comments regarding this proposal are to be submitted within 30 days of publication to:

William T. Walsh, Clerk  
United States District Court  
Martin Luther King, Jr. Federal Building  
and Courthouse  
P.O. Box 419  
Newark, NJ 07101

FOR THE COURT  
John W. Bissell  
Chief Judge